

and therefore the Court construes it to have its ordinary meaning, which in this instance is the same as the dictionary definition: "An asking or petition. The expression of a desire to some person for something to be granted or done." See BLACK'S LAW DICTIONARY 1304 (6th ed. 1990). A signed postcard authorization qualifies as a "customer request" and therefore SWBT, a party to the agreement, may release proprietary information provided to it by AT&T under the terms of the agreement.

Furthermore, the agreement provides that "[n]otwithstanding any other provision in this Agreement, a Party's ability to disclose information or use disclosed information is subject to all applicable statutes, decisions, and regulatory rules concerning the disclosure and use of such information which, by their express terms, mandate a different handling of such information." See Agreement, Exhibit K(7). The customer information defined as "proprietary" under the contract and at issue in this case is CPNI under the Telecommunications Act of 1996. See 47 U.S.C. § 222(f)(1)(B) (defining CPNI to include "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier"). Under the Act, CPNI *must* be disclosed by SWBT upon affirmative written request by the customer. See *id.* § 222(c)(2). The Act's disclosure provisions thus trump the agreement's disclosure provisions by the agreement's own terms.

In sum, AT&T cannot establish a substantial likelihood of prevailing on the merits of its breach of contract claim.

C. Misappropriation of Trade Secrets

Plaintiff also alleges that defendants' anticipated conduct would constitute a misappropriation of trade secrets. To establish a misappropriation of trade secret, plaintiff must establish: (1) a trade

secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir. 1994). A trade secret is "any formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it." *Id.* Plaintiff argues the proprietary information is akin to a vendor's list of customer names, addresses, and purchasing characteristics, which is protected as a trade secret under Texas law. *See Zeecon Indus. v. American Stockman Tag Co.*, 713 F.2d 1174, 1176 (5th Cir. 1983). A list of customer information is not protectable as a trade secret, however, if the information is generally known by others in the same business or readily ascertainable by an independent investigation. *Id.* at 1179. SWBT argues that it could obtain the identical long distance usage information by placing switches on its own lines to record the information and therefore that the customer list analogy is inapposite. Plaintiff, however, has submitted affidavits indicating that the collection of customer usage information is an expensive process. The expense renders the information not readily ascertainable and thus not subject to the exception for readily ascertainable customer lists. *See id.* at 1178-79 (failing to hold a district court's finding of a similar fact to be clearly erroneous).

Defendants seek to distinguish this particular list of customer information, arguing that once the information is published to the customer in the customer's bill, it ceases to retain any "secret" character it once may have had. Plaintiff is correct that this argument misconceives the nature of plaintiff's claim. It is not the raw information that is at issue, rather it is specifically the information in electronic form that AT&T seeks to protect—and alas, we have once again entered the conundrum of information as raw data versus information as data in a particular format. The proprietary

information protected in *Zoecon* was the information itself, the raw data, rather than the information in a particular format. The case is therefore not precisely on point. However, it is not distinguishable in any relevant way. Although the customer long distance information could conceivably be compiled by the defendants without acquiring the database, the fact that AT&T spends a considerable amount of money to compile the database may be sufficient to confer trade secret status upon it. *Cf. Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1125 (5th Cir. 1991) ("Secrecy is a relative term. The information may be known to several persons and yet still be secret if third parties would be willing to pay for a breach of trust in order to ascertain it." (citation omitted)), *aff'd on other grounds*, 505 U.S. 763 (1992).

Even if the database is classified as a trade secret, plaintiff's claim for misappropriation of its trade secret is likely to fail on the second required element. Given the disposition of the statutory and breach of contract claims, it cannot be said that the trade secret, the database, was "acquired through a breach of a confidential relationship or discovered by improper means." The contract expressly provides that contrary statutory provisions governing disclosure of customer information control, and the Telecommunications Act, as extensively discussed, likely provides for the disclosure of the database information at issue. Therefore, plaintiff is unable to establish a substantial likelihood of success on the merits of its misappropriation of trade secret claim.

d. Unjust Enrichment

Plaintiff's fourth claim is for unjust enrichment. Under Texas law, however, unjust enrichment is not an independent basis for a cause of action. *LaChance v. Hollenbeck*, 695 S.W.2d 618, 620 (Tex. App.—Austin 1985, writ ref'd n.r.e.); accord *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 609 (Tex. App.—Tarrant 1995, writ dismissed). The term "unjust enrichment" simply characterizes

the result when one fails to make restitution of benefits received under circumstances implicating an implied or quasi-contract. *LaChance*, 695 S.W.2d at 620. The unjust enrichment doctrine forms the basis of the measure of contractual damages known as quasi-contract or restitution. *Burlington N. R.R. Co. v. Southwestern Elec. Power. Co.*, 925 S.W.2d 92, 97 (Tex. App.—Texarkana 1996, no writ). Where the existence of a binding contract cannot be proven, the law implies a contractual obligation upon the defendant to restore the benefits unfairly received to the plaintiff. *See id.* Where a valid, express contract governs the subject matter of the dispute, however, the equitable remedy is unavailable. *Id.*

Here, the disclosure of proprietary customer information is expressly governed by the parties' agreement concerning billing and collections, and therefore plaintiff cannot obtain damages on the theory of unjust enrichment. Moreover, the receipt of the customer proprietary network information is permitted under the terms of both the statute and the contract and cannot therefore be considered "unjust." *See, e.g., id.* (explaining that unjust enrichment is usually found where there is fraud, duress, the taking of an undue advantage, or an where an intended contract is legally void). Plaintiff cannot establish a substantial likelihood of success on the merits of this claim.

e. Breach of Fiduciary Duty

By its fifth cause of action, AT&T contends that the defendants are agents of AT&T and are breaching a fiduciary duty owed to AT&T when they solicit AT&T's customers to request that SWBT release the customers' proprietary information and when they provide this information to AT&T's soon-to-be competitor, SBCS. To establish a breach of fiduciary duty, plaintiff must first, of course, establish that a fiduciary relationship exists between it and the defendants. Under Texas law, an agency relationship gives rise to a fiduciary relationship as a matter of law. *Sassen v.*

Tanglegrove Townhouse Condominium Ass'n, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied).

AT&T claims that SWBT is its agent, apparently by virtue of the contract between them. “Essential to an agency relationship,” however, “is the principal’s right to assign the agent’s task and control the means and details of the process by which the agent will accomplish the task.” *Walker v. Federal Kemper Life Assurance Co.*, 828 S.W.2d 442, 452 (Tex. App.—San Antonio 1992). Thus, “even if a person acts for or accommodates another,” without the element of control the relationship of agency does not exist. *Id.* Although the service contract between AT&T and SWBT obligates SWBT to bill for and collect long distance charges belonging to AT&T, the contract does not appear to give AT&T the requisite element of control over the details of the billing and collection to render it SWBT’s principal. SWBT is therefore not AT&T’s agent.

Fiduciary duties may also arise from a less formal relationship than that of agency. A fiduciary relationship exists wherever one party is “under a duty to act for or give advice for the benefit of another within the scope of the relationship.” *Doe v. Boys Clubs, Inc.*, 868 S.W.2d 942, 955 (Tex. App.—Amarillo 1994), *aff’d on other grounds*, 907 S.W.2d 472 (1995). It may arise from imbalance of power where justifiable trust exists. *See id.* It cannot, however, arise merely by the existence of a contract. “[A] party to a contract is free to pursue its own interests, even if it results in a breach of that contract, without incurring tort liability.” *Crim Truck & Tractor Co. v. Navistar Int’l Trans. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). A fiduciary duty must inhere in the relationship outside the contract itself.

The relationship between AT&T and SWBT appears to be simply contractual rather than of the “extraordinary” quality of fiduciary. *See Doe*, 868 S.W.2d at 955 (describing fiduciary duties as

"extraordinary"). Defendants' action of soliciting customer requests simply cannot be accurately characterized as an abuse of influence. It cannot reasonably be believed that AT&T, an enormous, highly sophisticated corporation, vested its trust and reliance in SWBT (and, by extension, SWBT's alleged coconspirators) not to solicit customer requests for disclosure when the agreement itself contemplates customer-authorized disclosures. The contract is the product of an arms-length transaction between corporations of comparable power. The proprietary quality of the information provided pursuant to the contract does not alone create a fiduciary duty.

Plaintiff cannot establish a substantial likelihood of success on the merits and therefore this cause of action provides an insufficient cause upon which to ground a preliminary injunction.

f. Civil Conspiracy

Plaintiff's last hope is its claim for civil conspiracy. The essential elements that must be established to prove a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Plaintiff is unlikely to succeed on this claim because it is unlikely to be able to establish an unlawful act.

Because Plaintiff AT&T cannot establish a substantial likelihood of success on any of its causes of action, the inquiry ends here; the Court cannot grant the preliminary injunction AT&T seeks. However, in the interest of completeness, the Court will briefly touch upon the other elements required to obtain an injunction.

II. Irreparable Injury

There is quite plainly a substantial threat AT&T will suffer harm if relief is not granted, but the harm is not irreparable. AT&T is soon to be in a direct competitive relationship with SBCS, the entity to receive the proprietary information at issue. Truly, AT&T will lose a competitive edge it currently maintains over its new competitor if it is required to share information for which a significant amount of resources was expended to obtain. And SBCS's stated intention to compile the information by data entry from the physical bills in the event an injunction is granted does not change this result. AT&T's competitive edge, however, unlike a secret process, product, or the like, is simply dollars—the defendant competitor will have to spend more money to acquire the customer information for marketing purposes if an injunction is granted than if it is not granted. Monetary loss alone is not the sort of “irreparable injury” appropriate for equitable relief—monetary damages can be awarded in a lawsuit.

III. Threatened Injury Outweighs Threatened Harm to the Defendant

The injury threatened to the plaintiff appears to outweigh the harm to the defendant caused by an injunction. Defendants have submitted an affidavit indicating that SBCS will have to expend \$4,875,000.00 if an injunction were to issue. Plaintiff rebuts this contention with an affidavit indicating the cost to defendants would only be \$300,000. Defendants would clearly have to expend substantial sums to obtain the desired information without the databases. Without an injunction, however, plaintiff would suffer financial injury not only in this instance but in all prospective situations similar to this case. This injury likely outweighs whatever harm defendants would actually incur if enjoined.

IV. The Granting of Relief Will Not Disserve the Public Interest

Given the central purpose of the Telecommunications Act of 1996 to stimulate competition for the benefit of customers, granting the injunction would appear to disserve the public interest. Truly, one negative result of a failure to enjoin defendants will likely be (and it is suggested already has been) an unwillingness on the part of long distance service providers like AT&T to enter into billing contracts for the provision of a single telephone bill. The burden to the telecommunications consumer of paying two separate bills, however, is far outweighed by the benefits flowing from increased competition in an historically regulated, even strangled, industry. The Court concludes, therefore, that enjoining the defendants' activities would, on balance, disserve the public interest.

Plaintiff is only able to establish one of the four requisite elements for the issuance of a preliminary injunction. Therefore,

IT IS ORDERED that Plaintiff's Motions for Temporary Restraining Order [#2] and for Preliminary Injunction [#32] are DENIED.

SIGNED on this the 4th day of October 1996.


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, “ REPLY COMMENTS OF SBC COMMUNICATIONS INC.,” in CC Docket No. 96-115 has been filed this 14TH day of April, 1998 to the Parties of Record.

Katie M. Turner

Katie M. Turner

April 14, 1998

**ITS INC
1231 20TH STREET
GROUND FLOOR
WASHINGTON, DC 20036**

**JANICE MYLES
FEDERAL COMMUNICATIONS COMMISSION
COMMON CARRIER BUREAU
1919 M STREET RM 544
WASHINGTON DC 20544**

**IRWIN A POPOWSKY
CONSUMER ADVOCATE
OFFICE OF ATTORNEY GENERAL
1425 STRAWBERRY SQUARE
HARRISBURG PA 17120**

**ANTHONY J GENOVESI
LEGISLATIVE OFFICE BLDG
ROOM 456
ALBANY NY 12248-0001**

**PAUL RODGERS
GENERAL COUNSEL
1201 CONSTITUTION AVE STE 1102
WASHINGTON DC 20044**

**CHARLES H HELEIN
GENERAL COUNSEL
HELEIN & ASSOCIATES
COUNSEL FOR AMERICAS
TELECOMMUNICATIONS ASSOC
8180 GREENSBORO DR STE 700
MCCLEAN VA 22102**

**JACKIE FOLLIS
SENIOR POLICY ANALYST
PUBLIC UTILITY COMMISSION OF TEXAS
7800 SHOAL CREEK BOULEVARD
AUSTIN TX 78757-1098**

**KENNETH RUST
DIRECTOR
NYNEX GOVERNMENT AFFAIRS
1300 I ST STE 400 W
WASHINGTON DC 20005**

**SAUL FISHER
NYNEX TELEPHONE COMPANIES
1095 AVENUE OF THE AMERICAS
NEW YORK NY 10036**

**THEODORE CASE WHITEHOUSE
WILLKIE FARR & GALLAGHER
COUNSEL FOR ASSOCIATION OF DIRECTORY
PUBLISHERS
1155 21ST ST NW
WASHINGTON DC 20036**

**DAVID L MEIER
DIRECTOR
CINCINNATI BELL TELEPHONE
201 E FOURTH ST
CINCINNATI OH 45201-2301**

**DAVID A GROSS
AIRTOUCH COMMUNICATIONS INC
1818 N STREET NW STE 800
WASHINGTON DC 20036**

**ALBERT HALPRIN
HALPRIN TEMPLE GOODMAN & SUGRUE
COUNSEL FOR YELLOW PAGES PUBLISHERS
ASSOC
1100 NEW YORK AVE NW STE 650E
WASHINGTON DC 20005**

**KATHYRN MARIE KRAUSE
U S WEST INC
1020 19TH ST NW STE 700
WASHINGTON DC 20036**

**DANNY E ADAMS
KELLEY DRYE & WARREN LLP
1200 NINETEENTH ST NW STE 500
WASHINGTON DC 20036**

**MARK C ROSENBLUM
AT&T CORP
295 NORTH MAPLE AVE RM 3245I1
BASKING RIDGE NJ 07920**

**GLEN S RABIN
FEDERAL REGULATORY COUNSEL
ALLTEL TELEPHONE SERVICES
CORPORATION
655 15TH ST NW STE 200
WASHINGTON DC 20005**

**JUDITH ST LEDGER-ROTY
REED SMITH SHAW & MCCLAY
1301 K ST NW STE 1100 EAST TOWER
WASHINGTON DC 20005-3317**

**DENNIS C BROWN
BROWN AND SCHWANINGER
SMALL BUSINESS IN TELECOMMUNICATIONS
1835 K STREET NW STE 650
WASHINGTON DC 20006**

**CARL W NORTHROP
PAUL HASTINGS JANOFISKY & WALKER
COUNSEL FOR ARCH COMMUNICATIONS
GROUP
1299 PENNSYLVANIA AVE NW 10TH FL
WASHINGTON DC 20004-2400**

**MARY MCDERMOTT
UNITED STATES TELEPHONE ASSOCIATION
1401 H ST NW STE 600
WASHINGTON DC 20005**

**ANDREW D LIPMAN
SWIDLER & BERLIN
COUNSEL FOR MFS COMMUNICATIONS CO
3000 K ST NW STE 300
WASHINGTON DC 20007**

**BRADLEY STILLMAN
COUNSEL FOR
CONSUMER FEDERATION OF AMERICA
1424 16TH ST NW SUITE 604
WASHINGTON DC 20036**

**CATHERINE R SLOAN
WORLD COM INC
d/b/a LDDS WORLD COM
1120 CONNECTICUT AVE NW
SUITE 400
WASHINGTON DC 20036**

**CHARLES C HUNTER
HUNTER & MOW PC
COUNSEL FOR TELECOMMUNICATIONS
RESELLERS ASSOCIATION
1620 I ST NW STE 701
WASHINGTON DC 20006**

**PETER ARTH, JR.
MARY MAC ADU
PEOPLE OF THE STATE OF CALIFORNIA AND
THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA
505 VAN NESS AVE
SAN FRANCISCO CA 94102**

**RANDOLPH J MAY
SUTHERLAND ASBILL & BRENNAN
COUNSEL FOR COMPUSERVE INC
1275 PENNSYLVANIA AVE NW
WASHINGTON DC 20004-2404**

**INTELCOM GROUP (USA) INC
CINDY Z SCHONHAUT
VICE PRESIDENT GOVERNMENT AFFAIRS
9605 EAST MAROON CIRCLE
ENGLEWOOD CO 80112**

**THE BELL ATLANTIC TELEPHONE
COMPANIES
LAWRENCE W KATZ
1320 NORTH COURT HOUSE ROAD
EIGHTH FLOOR
ARLINGTON VA 22201**

**AMERITECH
MICHAEL S PABIAN
2000 WEST AMERITECH CENTER DRIVE
RM 4H82
HOFFMAN ESTATES IL 60196**

**BELLSOUTH CORPORATION
M ROBERT SUTHERLAND
A KIRVEN GILBERT III
SUITE 1700
1155 PEACHTREE STREET NE
ATLANTA GA 30309-3610**

**AMERICAN PUBLIC COMMUNICATIONS
COUNCIL
ALBERT H KRAMER
ROBERT F ALDRICH
DICKSTEIN SHAPIRO & MORIN LLP
2101 L STREET NW
WASHINGTON DC 20554**

**MARK J GOLDEN
VICE PRESIDENT OF INDUSTRY AFFAIRS
PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION
500 MONTGOMERY STREET
SUITE 700
ALEXANDRIA VA 22314-1561**

**JONATHAN E CANIS
REED SMITH SHAW & MCCLAY
1301 K STREET NW
SUITE 1100 EAST TOWER
WASHINGTON DC 20005**

**GTE SERVICE CORPORATION
GAIL L POLIVY
1850 M STREET NW
WASHINGTON DC 20036**

**GTE SERVICE CORPORATION
RICHARD MCKENNA
600 HIDDEN RIDGE
IRVING TEXAS 75015**

**CABLE & WIRELESS INC
ANN P MORTON
8219 LEESBURG PIKE
VIENNA VIRGINIA 22182**

**TELEPORT COMMUNICATIONS GROUP INC
TERESA MARRERO
SENIOR REGULATORY COUNSEL
ONE TELEPORT DRIVE SUITE 300
STATEN ISLAND NY 10310**

**SPRINT CORPORATION
JAY C KEITHLEY
LEON M KESTENBAUM
MICHAEL B FINGERHUT
1850 M STREET NW 11TH FLOOR
WASHINGTON DC 20036**

**MICHAEL J SHORTLEY III
FRONTIER CORPORATION
180 SOUTH CLINTON AVENUE
ROCHESTER NY 14646**

**EXCEL TELECOMMUNICATIONS INC
J CHRISTOPHER DANCE
VICE PRESIDENT LEGAL AFFAIRS
KERRY TASSOPOULOS
DIRECTOR OF GOVERNMENT AFFAIRS
9330 LBJ FREEWAY
SUITE 1220
DALLAS TEXAS 75243**

**THOMAS K CROWE
LAW OFFICES OF THOMAS K CROWE P.C.
COUNSEL FOR
EXCEL TELECOMMUNICATIONS INC
2300 M STREET NW
SUITE 800
WASHINGTON DC 20037**

**INFORMATION TECHNOLOGY ASSOCIATION
OF AMERICA
JOSEPH P MARKOSKI
MARC BEREJKA
SQUIRE SANDERS & DEMPSEY
1201 PENNSYLVANIA AVENUE NW
P O BOX 407
WASHINGTON DC 20044**

**COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
GENEVIEVE MORELLI
VICE PRESIDENT AND GENERAL COUNSEL
1140 CONNECTICUT AVENUE NW SUITE 220
WASHINGTON DC 20036**

**COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
DANNY E ADAMS
STEVEN A AUGUSTINO
KELLEY DRYE & WARREN LLP
1200 NINETEENTH STREET NW SUITE 500
WASHINGTON DC 20036**

**MCI TELECOMMUNICATIONS CORPORATION
FRANK W KROGH
DONALD J ELARDO
1801 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20006**

**ELIZABETH H MCJIMSEY
ATTORNEY FOR SPRINT SPECTRUM LP
d/b/a SPRINT PCS
4900 MAIN ST 12TH FLOOR
KANSAS CITY MO 64112**

**PHILIP L MALET
JAMES M TALENS
STEPTOE & JOHNSON LLP
COUNSEL FOR IRIDIUM NORTH AMERICA
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036**

**DANNY E ADAMS
STEVEN A AUGUSTINO
KELLEY DRYE & WARREN LLP
COUNSEL FOR ALARM INDUSTRY
COMMUNICATIONS COMMITTEE
1200 NINETEENTH ST NW STE 500
WASHINGTON DC 20036**

**JONATHAN E CANIS
KELLEY DRYE & WARREN LLP
COUNSEL FOR INTERMEDIA
COMMUNICATIONS INC
1200 NINETEENTH ST NW STE 500
WASHINGTON DC 20036**